1992

S. Larry Crookston, Randi L. Crookston, and Anna W. Drake, Spencer Larry Crookston, and Randi Lynn Crookston v. Fire Insurance Exchange : Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

S. LARRY CROOKSTON, RANDI L. CROOKSTON, AND ANNA W. DRAKE, Trustee of the Estate of SPENCER LARRY CROOKSTON and RANDI LYNN CROOKSTON,	)	
Plaintiffs-Respondents,	)	Docket No. 920172
vs.	)	Category 16
FIRE INSURANCE EXCHANGE, a California corporation,	)	
Defendant-Appellant.	)	

BRIEF OF APPELLANT FIRE INSURANCE EXCHANGE

Appeal from the Judgment of the Third Judicial District Court,
Salt Lake County, Honorable J. Dennis Frederick presiding

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JURISDICTIONAL STATEMENT AND CASE HISTORY

Jurisdiction lies with this Court pursuant to Utah Code Annotated § 78-2-2(3)(j) (Supp. 1992). This appeal is taken from the Order denying defendant's Motion for New Trial or Remittitur entered by the Third Judicial District Court of Salt Lake County, the Honorable J. Dennis Frederick presiding, on March 25, 1992.

STATEMENT OF THE ISSUES

1. Did the trial court err in refusing defendant a new trial by jury on the issue of punitive damages utilizing the standard enunciated in Crookston, et al. v. Fire Ins. Exchange, 817 P.2d 789 (Utah 1991)?

Standard of Review:

The decision of the court to retroactively apply an overruling decision is within the discretion of the court and as such will not be reversed absent an abuse of that discretion. Loyal Order of Moose, No. 259 v. County Board, 657 P.2d 257 (Utah 1982).

2. Did the trial court err in refusing to remit the punitive damage award in accordance with the standards set forth in Crookston?

Standard of Review:

In reviewing a trial court's decision to deny a new trial due to an excessive verdict, an appellate court will reverse only if there is no reasonable basis for the decision. Crookston v. Fire Ins. Exchange, 817 P.2d 789, 805 (Utah 1991).

3. Did the trial court err in considering facts not properly before it in ruling on defendant's Motion for New Trial or Remittitur?

Standard of Review:

Whether a piece of evidence is admissible is a question of fact. Evidentiary rulings are reviewed under a correctness standard. Grayson, Ltd. Partnership v. Finlayson, 782 P.2d 467, 470 (Utah 1989).

DETERMINATIVE AUTHORITIES

Rule 59 of that Utah Rules of Civil Procedure. Due to the length of this provision, the text will be set forth in the appendix.

STATEMENT OF THE CASE

This case now comes before the Utah Supreme Court for the second time. In Crookston v. Fire Ins. Exchange, 817 P.2d 789 (Utah 1991), this court vacated in part the trial court's denial of defendant's Motion for New Trial or Remittitur and remanded the action back to the trial court for reconsideration consistent with this Court's opinion in Crookston. The underlying facts of this case were reviewed in a light most favorable to the jury's verdict in this Court's opinion in Crookston. In addition to the facts set forth in this Court's opinion and the parties' briefs on file with the Court in the first appeal, Docket No. 880034, defendant respectfully submits the following additional factual background to this appeal.

STATEMENT OF FACTS

At the time of trial, plaintiffs' expert economist, Paul Randle, Ph.D., identified the type, extent and nature of damages alleged to have been sustained by plaintiffs as a result of defendant's conduct, as follows:

-	Loss of equity position in property and house	$104,817 (R. 838)
-	Out-of-pocket expenses[1]	$ 3,198 (R. 839)
-	Bankruptcy costs	$ 3,139 (R. 839)
-	Lost income of Larry Crookston due to inability to work as part-time janitor (1982-84)	$ 31,798 (R. 839-841)

[1] Identified as consisting of "monies that [plaintiffs] have personally expended in connection with construction on the site, building permits, and taxes, utilities, insurance premiums . . . sweat equity . . . and loan fees." (R. 839)

-	Lost income of Larry Crookston due to failure to obtain nursing degree (1984 - time of trial)	$ 72,251 (R. 842-844)
-	Future loss of income of Larry Crookston due to impairment of income in his nursing profession (time of trial - 1990)	$ 83,306 (R. 845)
-	Lost past fringe benefits of Larry Crookston	$ 11,560 (R. 847-848)
-	Future loss of fringe benefits of Larry Crookston	$ 13,300 (R. 848)
	Total	$323,399[2]

During his testimony, Dr. Randle also testified that it was impossible for him to render a precise expert opinion as to any hard economic injury allegedly sustained by plaintiffs attributable to their having to file bankruptcy. Dr. Randle testified as follows:

> Q. Have you attempted to calculate this type of economic loss which could be suffered by the Crookstons, the type that you have described . . .?
>
> A. I have not.
>
> Q. Can you do that?
>
> A. I don't think I can. I guess it might be possible, but I have two questions that I just don't have the kind of crystal ball that allows me to gaze into this aspect of their lives and put a dollar value on it. It's too speculative for me. (R. 858-859)

During the initial appeal brought by defendant, this Court affirmed the trial jury's verdict and the trial court's refusal to

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[2]Those damage figures relating to past economic damages as of the time of trial included 10% interest from the time of the alleged damage, some of which was sustained in 1982, until the time of trial in 1987.

grant a new trial or remittitur on the issue of the compensatory damages. The original jury verdict was for $815,826 in compensatory damages and $4,000,000 in punitive damages. (R. 1543-46) In reviewing the trial testimony on the issue of compensatory damages, this Court stated:

> [T]estimony at trial attributed $323,399 of the $815,826 [in compensatory damages awarded at trial] to economic loss, making the remaining $492,427 apparently attributable to emotional distress and loss of financial reputation.

Crookston, 817 P.2d at 795. The Court also noted that the trial court had entered an additional judgment against defendant awarding plaintiffs attorney fees of $175,000 and expenses of $11,126. Id. The Court, however, vacated the trial court's denial of defendant's Motion for New Trial or Remittitur on the issue of punitive damages and remanded the action back to the trial court for reconsideration consistent with the Court's opinion in Crookston.

Following the issuance of this Court's opinion in Crookston on June 28, 1991, defendant, on July 22, 1991, tendered two cashier's checks totaling $1,489,263.14 to plaintiffs and their counsel. Said sum was paid in full and complete satisfaction of plaintiffs' judgments for compensatory damages, attorney's fees and costs against defendant. As a result, all that remains unpaid of plaintiffs' judgments against defendant is the $4,000,000 punitive damage award. (R. 3044-3045)

On remand, the parties attempted to negotiate a potential settlement of the punitive damage award, but having failed to do so

went forward on defendant's Motion for New Trial or Remittitur. Following oral argument on the motion on January 31, 1992, the trial court issued a 23-page Memorandum Decision on February 10, 1992, setting forth the reasons for its denial of defendant's motion. (R. 3197-3219) Plaintiffs' counsel then prepared a proposed order and submitted the same to defendant's counsel. Defendant's counsel timely objected to the form of the proposed order. (R. 3222-3226) Over the objection of defendant, the trial court entered its Findings of Fact, Conclusions of Law and Order Denying Defendant's Motion for New Trial or in the Alternative Remittitur on March 25, 1992. (R. 3238-3242)

SUMMARY OF ARGUMENTS

This case involves an unprecedented award of $4.0 million in punitive damages. The initial jury verdict was rendered with "essentially standardless discretion." This Court in the first appeal of this case, Crookston v. Fire Insurance Exchange, 817 P.2d 789 (Utah 1991), crafted a new standard for ensuring that punitive awards bear a reasonable and rational relationship to other damages awarded in a case. The sheer size and disparate relationship between the punitive award and the compensatory damages in this case demonstrate that the original jury was influenced by passion and prejudice. The interests of justice and fair play require that a new jury utilizing the Crookston standards be allowed to pass on the issue of punitive damages.

In determining whether the jury's punitive award was unduly excessive, this Court has traditionally reviewed verdicts in light

of several evidentiary factors. Application of the traditional "list of factors" and the standards set forth in Crookston require a reduction in the punitive damage award in this case.

The trial court further committed error in considering on remand numerous facts and inferences not properly before the court. The trial court erred in considering numerous facts which were never introduced into evidence before the original jury.

ARGUMENT

POINT I.

THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO PERMIT A NEW JURY TO REASSESS THE PUNITIVE DAMAGE ISSUE UNDER THE STANDARDS ENUNCIATED BY THIS COURT IN CROOKSTON.

A. The Original Verdict Was Rendered Under Pre-Crookston Standards

This Court in Crookston v. Fire Ins. Exchange, 817 P.2d 789 (Utah 1991), acknowledges that the unprecedented $4.0 million punitive damage award in this case clearly "exceeds the general pattern" established in prior Utah cases. Id. at 807. In Crookston, the Court also notes the numerous problems which are created by giving finders of fact "essentially standardless discretion" to award punitive damages. Id. at 809. The original jury verdict rendered in this case was the product of such a "standardless" standard.

In vacating the trial court's order denying defendant's Motion for New Trial or Remittitur, this Court observed at least the following deficiencies in the punitive damage "standard" utilized by the jury in this case:

- "[A] review of our case law in punitive damages has left us dissatisfied with articulated standards for determining the amount of such awards." Id. at 808.

- "These standards provide little guidance for . . . a jury fixing the punitive damages . . .." Id.

- "The stated list of factors we have said must be considered in assessing the amount of punitives to be awarded include the following . . .. Our cases have done little more than list these factors. No relative weights have been assigned them, and no standards or formulas have been established for properly evaluating them when making an award or when reviewing the propensity of a jury award. This makes such an enterprise highly problematic for judge and jury. The finder of fact has no guidance on how much weight to give each factor or even how the factors should be assessed. And nothing suggests to the jury or the trial court that there is any sort of limit or ceiling on an award." Id.

- "[Q]uite predictably, the bases for awards made in those jurisdictions [utilizing similar "list of factors" tests to fix punitive awards] are no more fathomable than ours. The problem that results from this lack of guidance to juries . . . is exemplified by disparate ratios of punitive to actual damages . . .." Id.

- "[T]he standard by which the jury is to gauge the amount of punitive damages, if any, that it is to award is incomprehensibly vague and unintelligible . . .. Under such a 'standard,' one jury can award $21,130.86 and another $2,490,000 for the same 'wrong.'" Id. at 809 (quoting Charter Hospital of Mobile, Inc. v. Weinberg, 558 So.2d 909, 916-17 (Ala. 1990).

- "Many states have recognized the problems created by giving finders of fact essentially standardless discretion to award punitive damages . . .." Id.

The above-noted deficiencies which were inherent in the standards for assessing punitive damages in the State of Utah before Crookston compelled this court to "craft" a new set of

guidelines for awarding punitive damages. Id. at 808. In adopting such guidelines, the court adopted a "middle ground" approach, rather than continuing to rely solely on the traditional "list-of-factors standard" used in 1987 when the Crookston jury rendered its verdict. Id. at 809.

B. The Crookston "Reasonable and Rational" Relationship Requirement.

The new standard mandated by this Court's opinion in Crookston places additional emphasis or clarification on the requirement that there be a "reasonable and rational" relationship between a punitive damage award and the actual compensatory damages awarded by a jury. Id. at 810-11. This Court in Crookston further articulates the following general standard to enable juries, trial courts, and appellate courts to know what is mandated under the "reasonable and rational relationship" requirement:

> Generally, we have found punitive damage awards below $100,000 not to be excessive only when the punitives do not exceed actual damages by more than a ratio of approximately 3-to-1. (Citations omitted)
>
> Because of the limited number of cases considering large awards, it is more difficult to note a particular pattern once the award exceeds approximately $100,000. However, it is safe to say that these large awards appear to receive more scrutiny than the smaller awards and that the acceptable ratio appears lower. (Citations omitted)
>
> The general rule to be drawn from our past cases appears to be that where the punitives are well below $100,000, punitive damage awards beyond a 3-to-1 ratio to actual damages have seldom been upheld and that where the award is in excess of $100,000, we have

> indicated some inclination to overturn awards having ratios of less than 3-to-1.

Id. at 810 (emphasis added)

C. Justice Requires That A New Jury Fix The Punitive Award With The Crookston Standards.

This Court in Crookston did not clearly state what type of procedure the parties were entitled to in order to facilitate "further consideration" of the punitive damage award in this case. Defendant requested that the trial court permit defendant to retry the issue of punitive damages to a new jury utilizing the Crookston standards. While the Federal or State Constitution do not apparently require the retroactive application of the Crookston opinion, notions of fair play and justice suggest strongly that a new jury should have been permitted to pass on the issue of punitive damages utilizing the Crookston standards. Even though courts are afforded discretion in determining whether to apply overruling decisions retroactively to pending actions, Loyal Order of Moose No. 259 v. County Board, 657 P.2d 257 (Utah 1982), this Court has also acknowledged that "ordinarily an overruling decision has retroactive operation." Id. at 264.

This Court is once again confronted with a challenge to an excessive punitive damage award rendered by a jury utilizing "essentially standardless discretion." On remand, Judge Frederick attempted to utilize the standards contained in the Crookston opinion to review an "essentially standardless" punitive award. Such a procedure which allowed the original trier of fact to use one formula, albeit of dubious assistance and guidance, to render

a $4.0 million punitive award, and then permitted Judge Frederick to use a new standard to review and pass upon the appropriateness of the initial award is fundamentally flawed. Such a procedure effectively infringes upon the rights to procedural fairness, due process, and trial by jury. The only procedure which would protect the interests of justice and fair play would be for a new jury to pass on the issue of punitive damages utilizing the Crookston standards.[3]

POINT II.

THE TRIAL COURT COMMITTED ERROR IN REFUSING TO REMIT THE $4.0 MILLION PUNITIVE DAMAGE AWARD IN ACCORDANCE WITH THE STANDARDS SET FORTH IN CROOKSTON.

This Court in Crookston outlined the standards by which punitive awards should be reviewed by trial and appellate courts to ensure due process and fairness for all parties involved. The reviewing court is to first determine whether punitive damages "are appropriate at all." Id. at 808. This Court has already found that the requisite mental state for an award of punitive damages was properly decided by the jury. Id. The second inquiry in the post-verdict review is "whether the amount of punitives is excessive." Id. In determining the issue of excessiveness, a reviewing court is required to determine whether the award is excessive in light of the traditional "list of factors" standards:

> [T]he amount of the actual damages awarded, the nature of the wrongdoer's acts, the facts and

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[3] On remand, defendant submitted to the trial court proposed jury instructions which incorporated the new standard set forth in Crookston. (R. 3189-90)

> circumstances surrounding the wrongful acts, the relative wealth of the wrongdoer, the probability the wrongdoer might act in the same way in the future, the relationship between the parties, and the effect of the misconduct on the lives of the victims and others.

Von Hake v. Thomas, 705 P.2d 766, 771 (Utah 1985). In reviewing the excessiveness of a punitive award, this Court in Crookston further required that the punitive damages bear a "rational and reasonable" relationship to the compensatory damages awarded. In so doing, the Court set certain presumptive ratios. Crookston, 817 P.2d at 808. Analysis and application of the "list of factors" and the Crookston presumptive ratios to the present case demonstrate the excessive nature of the punitive damage award in this case.

1. Amount of Actual Damages Awarded.

At trial plaintiffs introduced evidence that they had sustained $323,399 in "hard" damages.[4] The remaining $492,427 of the compensatory award apparently was based on the plaintiffs' emotional distress and loss of financial reputation. Such damages are characterized as "soft" damages. In Crookston, this court noted that one of the factors that may justify a remittitur is "the fact that a substantial portion of the actual damages is "soft," thus making the ratio analysis suspect. Id. at 811. In this case, plaintiffs' damages, including prejudgment interest, were roughly 60% "soft" and 40% "hard". Defendant does not dispute that those "soft" damages were "real." The critical issue is whether such

[4] It is important to also note that the "hard" damages awarded to plaintiffs by the jury were based upon the computations of Dr. Paul Randle. Dr. Randle inflated the "hard" damages at the time of trial by including 10% prejudgment interest in his calculations. As a result, the actual "hard" damages sustained by the plaintiffs were considerably less than the $323,399 testified to by Dr. Randle.

"soft" damages should be taken into account in applying the Crookston ratio standards. While general damages, such as for pain and suffering, are "real," they are considered "soft" because there is no ascertainable, tangible barometer or measurement by which they can be fixed with any mathematical basis or accuracy. On the other hand, "hard" damages, i.e., actual out-of-pocket damages, can be ascertained with mathematical precision, as Dr. Randle did in this case, opining that the "hard" damages consisted of exactly $323,399.

Since more than 60% of the jury's compensatory damage award in this case consists of "soft" damages, it would be unfair and improper for this Court to apply the Crookston ratio standard to the entire compensatory award of $815,826. As the case currently stands, the $4.0 million punitive award bears more than a 4.9 to 1 relationship to the compensatory damage award. However, if only "soft" damages are considered in applying the Crookston ratio, the punitive award bears an approximately 12.4 to 1 ratio to the "soft" damages. Under either view, the punitive damage award grossly exceeds the ratios suggested by Crookston.

While this Court in Crookston suggested strongly that the trial court should take into account the distinction between "hard" and "soft" damages when determining the appropriate amount of punitive damages, the trial court refused to make such a distinction. Id. at 811, n. 29. It is interesting to note the lengths to which the trial court went to try to make the plaintiffs' damages fall within the Crookston presumptive ratio

standards. In the Memorandum Decision of February 10, 1992, the trial court characterized its additional judgment of $175,000 in attorney's fees, $151,330 in unawarded fees, and $11,126 in litigation expenses and costs as "actual damages". (R. 3214) The trial court then found the amount of actual damages to be $1,153,282. (R. 3214) The trial court then must have taken some consolation that its calculations now resulted in a punitive damage award falling within the presumptive ratio, stating, "when compared to the punitive damage sum awarded of $4,000,000, the ratio is approximately 2.88 to 1." (R. 3214) However, the trial court's mathematics were in error. Even assuming actual damages of $1,153,282, the ratio of punitive damages to the trial court's view of "actual damages" still resulted in a ratio of approximately 3.47 to 1. Thus, not even the trial court could find a way to inflate the damages in this case to fall within the presumptive ratio standard.

In determining the excessiveness of the punitive damages in this case, this Court should also take into account the sheer size of the extremely large award of "soft" damages, totaling nearly one-half million dollars in this case. In Cruz v. Montoya, 660 P.2d 723 (Utah 1983), this Court remitted an award of punitive damages in part because "the jury was generous in its award of general damages." Id. at 727. In Cruz, the plaintiff was beaten in a physical altercation with the defendant. The jury awarded $9,000 in general damages, $579.89 in special damages, and $12,000 in punitive damages. Although the court found that $9,000 in

general damages was not excessive, the court felt that the jury's generosity in awarding general damages necessitated a 50% reduction in the award of punitive damages. Id.

The unprecedented award of $4.0 million in punitive damages when considered alongside the significant award of compensatory damages demand a remittitur of the punitive damage award in this case. In Wilson v. Oldroyd, 1 Utah 62, 267 P.2d 759 (1954), this Court in reducing an award of punitive damages in a case involving "a very substantial judgment for compensatory damages," recognized the unique position that this Court must play in reviewing punitive damage awards:

> Punitive damages are awarded on the theory that it is permissible in case of certain aggravated wrongs to permit the private litigant, in the public interest, to impose a penalty upon the defendant as a punishment and to deter others from engaging in similar offenses. The reasons why the jury and the trial judge are particularly advantaged to fix compensatory damages are much less cogent here. For this reason we feel more at liberty to review and modify the award as to punitive damages.

Wilson, 267 P.2d at 766 (emphasis added).

If left unremitted, the jury's punitive damage award in this case would not only grossly exceed the Crookston ratio standard, but would also amount to a penalty of nearly two and one-half months of defendant's net income in 1986. Such an award has been found in other jurisdictions to be clearly excessive. See Egan v. Mutual of Omaha Ins. Co., 24 Cal.3d 809, 169 Cal.Rptr. 691, 620 P.2d 141, (1979) (Award of $5.0 million in punitive damages against

insurer was excessive as a matter of law where it represented two and one-half months of insurer's entire net income in one year).

2. The Nature of the Wrongdoer's Acts.

This Court has affirmed the jury's finding that defendant committed fraud upon plaintiffs. Crookston, 817 P.2d at 800. In reviewing the published cases involving punitive awards in cases of fraud, defendant has been unable to locate a Utah case where a jury has rendered a punitive damage award even approaching $4.0 million. While defendant acknowledges the jury's verdict against defendant has been affirmed by this Court, the record still does not contain any direct evidence that defendant's employees acted out of vindictiveness or ill will towards plaintiffs. In fact, the direct evidence was to the contrary. (R. 1952-53, 2295)

There were many extenuating circumstances in this case, the uniqueness of the loss itself, the inability of the parties to promptly obtain bids on the loss, and the repeated and insistent demands by the bank for payment under the policy. While such factors do not excuse defendant's conduct, such factors explain why this claim went awry. Plaintiffs were successful in convincing the jury that they had sustained real and significant injuries as a result of defendant's conduct. Plaintiffs were likewise successful in maintaining that the conduct of defendant was not only antisocial but outrageous. However, it can scarcely be said that the facts of this case are significantly worse than any other reported case in the State of Utah. Even a casual review of the case law of this state discloses equally deplorable conduct being

punished and deterred by much less severe awards of punitive damages.

In Von Hake v. Thomas, 705 P.2d 766 (Utah 1985), a $500,000 punitive damage award was affirmed against an individual who was found liable for defrauding an 82-year old man out of his ranch. The plaintiff had spent nearly 40 years building up his ranch at the time of the defendant's fraudulent acts. The defendant fraudulently obtained the ranch for approximately 10% of its conservatively assessed valuation of more than one million dollars by ingratiating himself with plaintiff, and by making false statements which led plaintiff to believe that the defendant was going to "save" plaintiff's ranch from a foreclosure sale. Von Hake represents the highest punitive damage award affirmed by this Court.

While defendant's conduct has been found to have been wrongful, the facts of this case do not warrant a punitive damage award of $4.0 million, eight times the size of the next highest award affirmed on appeal in Von Hake.

3. Facts and Circumstances Surrounding Defendant's Misconduct.

This case arises from a situation where defendant owed duties to both plaintiffs and Rocky Mountain State Bank for the adjustment of the loss. The circumstances surrounding this loss were highly unique. The potential for delay, mistake, and errors of judgment were significant. While plaintiff maintained that defendant's employees acted with ill will, malice and total indifference toward

the Crookstons, the finding of malice upon which the jury based its punitive damage award was based upon circumstantial evidence. No witness at the trial testified that defendant's employees had actual malice towards plaintiffs. Where there is only circumstantial evidence of malice, a large and unprecedent award of punitive damages is unsupportable. In First Security Bank of Utah v. J.B.J. Feedyards, Inc., 653 P.2d 791 (Utah 1982), this Court noted that an award of $100,000 was unsupportable where there was no direct evidence of the defendant's actual malice:

> In this case, the finding of actual malice on which the lower court based its punitive damages award was not derived from direct evidence concerning the state of mind of plaintiff's officers, but rather was inferred from plaintiff's wrongful actions. Such evidence, while sufficient to sustain the finding of the trial court, does not show a vindictiveness or ill will so extreme as to warrant the vast sum awarded here, which is many times greater than the punitive damages awards in any of the cases cited by intervenor. The trial court's award of $100,000, considered in light of the actual harm suffered by the intervenor, the degree of malice shown by plaintiff and the other factors listed above, appears to this Court so excessive as to indicate that it was "arrived at by passion or prejudice" in violation of the above-quoted standards. Under these circumstances, this Court must reduce the award to an amount which the evidence, viewed most favorably to intervenor, can justify. We direct the trial court to modify its judgment to provide for punitive damages award of $50,000.

Id. at 599 (emphasis added).

4. Defendant's Relative Wealth.

In determining whether the size of the punitive damage award in this case itself suggests a jury verdict motivated by passion and prejudice, this Court should pay particular attention to the

effect of having defendant's wealth injected into the case before liability had even been determined. Such a procedure is no longer permitted under Utah law. See Utah Code Ann. § 78-18-1(2) (Supp. 1992). The likelihood that evidence of a party's significant wealth might create undue prejudice and lead to excessive verdicts has been recognized by many courts. In City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 270-71 (1981), the United States Supreme Court noted:

> Because evidence of a tort-feasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded, the unlimited taxing power of a municipality may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award. The impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial . . ..

The prejudicial impact of allowing evidence of an insurance company's wealth to go to the jury before liability for compensatory damages is determined is likewise apparent. One commentator has stated:

> It is probable that this very evidence, instead of aiding the jury to assess a proper verdict, may prejudice them against the defendant and prevent an impartial judgment, not only on the size of the verdict, but in deciding who shall win the case. It is a good guess that rich men do not fare well before juries, and the more emphasis played on their riches the less well they fare.

Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173, 1191 (1931). See also, Wheeler, The Constitutional Case for Reforming Punitive Damages, 69 Va. L. Rev., 269, 285, 291 (1983).

It has long been established that justice should not depend upon a party's wealth or status. The introduction of evidence of defendant's wealth created a significant likelihood that an unprecedented award of punitive damages would be rendered in this case. The real potential for the jury to have misused evidence of defendant's wealth is further justification for this Court to remit the punitive award in this case.

Plaintiffs also successfully argued in the court below that public policy considerations of punishment and deterrence would only be served by an outright reaffirmation of the jury's $4.0 million punitive damage award. While defendant accepts this Court's pronouncement that an award of punitive damages is appropriate in this case, defendant respectfully submits that an award of $4.0 million is not required to effect the public policy concerns of deterrence and punishment. Plaintiffs' allegation that defendant has not yet been punished for its conduct ignores the reality of what has transpired since the day plaintiffs' home collapsed in 1982. Plaintiffs' own expert, Dr. Paul Randle, testified that this case arose from an underpayment of approximately $21,612 on plaintiff's loss. (R. 2458) Defendant has already been required to pay $1,489,263.14 in damages, fees and costs to plaintiffs. This represents nearly seventy (70) times the amount of the underpayment. Such costs do not even include the internal and external costs and fees incurred by defendant during the pendency of this case and the two appeals. If there is a lesson to be learned by defendant in this case, it can scarcely be

argued that paying nearly $1.5 million in compensatory damages as a result of a $21,612 underpayment would not teach that lesson and serve as a effective deterrent and punishment to defendant.

5. Probability of Future Reoccurrence of Misconduct.

Plaintiffs have asserted below that there is a tremendous potential and incentive for defendant's employees to engage in repeated misconduct in the future unless defendant is severely punished in this case. Nevertheless, the record demonstrates that there was no evidence introduced at trial suggesting that defendant would more than likely conduct itself in the same way in the future. Plaintiffs further ignore that the insurance industry is highly competitive and that competitiveness in the marketplace depends on the efficiency and thoroughness of service, not on insurance company mottos or slogan. Defendant would surely lose its ability to compete in the marketplace if its employees continued to engage in systematic fraud and bad faith, as suggested by plaintiff to the trial court. Such speculative and baseless assertions tend only to engender passion and prejudice and invite this court to abandon common sense and reason.

The probability of future reoccurrence of misconduct is further lessened by the uniqueness of the circumstances surrounding this case. Plaintiff's home was an earth home of unusual construction. The collapse and ensuing damage to plaintiffs' earth home were not ordinary events with which defendant or any other entity or individual, including plaintiffs, were familiar. Plaintiffs' loss was one of a kind. No one quite knew how to

handle the loss, not out of spite or ill will for plaintiffs, but due to the uniqueness of the loss. Due to the unique nature of plaintiffs' loss, many qualified contractors refused to even consider making a bid on the repair of plaintiffs' home. (R. 1687-88, 1976-77, 2035, 2557)

In the court below, plaintiffs maintained that defendant's alleged failure to admit wrongdoing or to punish the employees who handled plaintiffs' claim are evidence of a cold, calculated and callous attitude likely to result in future misconduct. Plaintiffs urge that defendant's failure to demonstrate a penitent attitude suggests the likelihood that defendant will continue engaging in alleged wrongdoings on other unsuspecting policyholders in the future. The demand that defendant destroy the careers of its employees and interrupt the lives of their family members due to alleged mistakes made in the handling of a single claim is unwarranted and mean spirited. The uniqueness of the circumstances presented in this case demonstrate a low probability that defendant will engage in similar conduct in the future. Under such circumstances, a remittitur is warranted. See Bundy v. Century Equipment Co., 692 P.2d 754, 759 (Utah 1984).

6. Relationship Between the Parties.

In Holland v. Moreton, 10 Utah 2d 390, 353 P.2d 789, 795 (1960), this Court stated:

> Where there is a wrong involving the violation of a duty springing from a relation of trust or confidence, and the wrong is of a gross and aggravated nature, the malicious conduct necessary to justify punitive damages may be found.

In this case, the controversy between plaintiffs and defendant arose in the context of a first-party insurance contract. This Court has recognized that no relationship of trust or reliance is created by an insurance contract. Beck v. Farmers Ins. Exchange, 701 P.2d 795, 800 (Utah 1985). Furthermore, practically speaking, an insurer and its insured are adversaries. Lyon v. Hartford Accid. & Indemn. Co., 25 Utah 2d 311, 480 P.2d 739, 745 (1971), overruled on other grounds, 701 P.2d 795, 798 (1985). Since there were no breaches of fiduciary duties in this case, the staggering award of punitive damages is further unsupportable.

7. Effect of the Misconduct on the Lives of the Victims and Others.

In denying defendant's Motion for New or Remittitur, the trial court has found that defendant's wrongdoing "had devastating effects upon the Crookstons and to a lesser degree, many other innocent parties." (R. 3239) Defendant does not dispute that the jury found that the Crookstons were harmed by defendant's conduct. While a significant amount of evidence was adduced at trial establishing the emotional difficulties suffered by the plaintiffs following the settlement between defendant and Rocky Mountain State Bank, the quality of the evidence introduced to the jury concerning plaintiffs' emotional distress does not support the unprecedented award of punitive damages here.

This Court has already suggested that the verdict on the compensatory award was "admittedly liberal." Crookston, 817 P.2d at 807, n. 22. The record establishes that plaintiffs were upset

and distraught over defendant's conduct. Nevertheless, there was not a single scintilla of medical testimony to support or substantiate the nature or extent of their emotional distress. The frustrations, aggravations, and traumas sustained by plaintiffs were unfortunate and serious. Plaintiffs' emotional difficulties have been fully compensated for by an admittedly "liberal" compensatory award. It should not be forgotten that the plaintiffs' emotional state was in part due to the mere fact that their "dream home" had collapsed. (R. 2209-10) As Mr. Crookston testified at trial, the collapse of the home was the most significant emotional trauma ever sustained by him or his family. (Id.) The evidence of plaintiffs' emotional distress, however, was qualitatively deficient to support a punitive damage award eight times the next highest reported punitive damage award in this state.[5]

POINT III.

THE TRIAL COURT COMMITTED ERROR BY CONSIDERING FACTS AND INFERENCES NOT SUPPORTED IN THE TRIAL RECORD.

On remand, the trial court permitted the parties to submit memoranda and oral argument on defendant's Motion for New Trial or Remittitur. Plaintiffs' memorandum in opposition contained numerous facts and inferences which were not properly before the trial court, including assertions that since the time of trial the

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[5] This Court should also contrast the punitive damage award and plaintiffs' emotional distress in this case with the facts in Elkington v. Foust, 618 P.2d 37 (Utah 1980) (Court affirmed a punitive damage award of $30,000 where there was expert medical testimony of permanent psychological damage resulting from seven years of prolonged sexual assault and abuse, including sexual intercourse, between a minor and her step-father).

plaintiffs had remained homeless, that plaintiffs had been unable to obtain credit, that plaintiffs' creditors had never been paid, and that defendant had never admitted wrongdoing or "voluntarily take any action to rectify the wrongs" or "reprimand the perpetrators." (R. 3125-3126) Plaintiffs' counsel also attempted to engender passion and prejudice in the trial judge by attempting to inject the wealth of other members of the Farmers Insurance Group of Companies into the proceedings. (R. 3273-74) Judge Frederick in his Memorandum Decision of February 10, 1992, incorporated many of those same facts and inferences into his ruling. (R. 3197-2219)

It is patently unfair for a trial court, charged with the duty to review the sufficiency of the evidence presented to a jury, to entertain and adopt facts and inferences never presented to the jury in the first instance. Defendant respectfully submits that the trial court's consideration and adoption of such prejudicial factors outside the trial record were improper and unduly tainted the trial court's ruling in this case.

The trial court's Order denying defendant's Motion for New Trial or Remittitur is further deficient to the extent that it contains findings of fact and conclusions of law which were not supported in the trial record by competent testimony. Paragraph 3 of the trial court's Order contains the following language not supported in the record:

> The wrongdoing of this case was motivated by financial gain. When dealing with a multi-million dollar corporation which appears to have a

> prevailing philosophy that justifies unscrupulous behavior for financial gain, a significant punitive award is required . . ..

(R. 3240)

Likewise, paragraph 4 of the Order contains the following language not supported in the record:

> This court concludes that the most effective means of punishing and deterring the defendant in this case is through a significant punitive damage award. Insurance companies are generally regulated by the Insurance Department of the State of Utah. This case illustrates the lack of deterrent effect of the Insurance Department.

(R. 3240)

Paragraph 6 of the Order also contains the following language not supported in the record:

> Defendant, by the very nature of its business, has the capacity and expertise to calculate in advance its exposure to liability and spread the cost thereof, thus diminishing the deterrent effect of punitive damages if limited by a ratio or ceiling. In this case the relative importance of the presumptive ratio should therefore be less.

(R. 3241)

The consideration of such facts and the conclusions of law drawn therefrom by the trial demonstrate the need for this matter to be either remanded for a new trial on the issue of punitive damages or for this Court to order an appropriate remittitur.

CONCLUSION

Based upon the foregoing, defendant Fire Insurance Exchange respectfully requests that this Court vacate the trial court's denial of defendant's Motion for New Trial or Remittitur and remand the action back to the trial court for a new trial on the issue of

punitive damages or in the alternative that this Court remit the unprecedented award of $4.0 million in punitive damages against this defendant based upon the record presented to the jury.

Dated this 20th day of July, 1992.

STRONG & HANNI

By _____
Philip R. Fishler
Stephen J. Trayner
Attorneys for Defendant-Appellant

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ADDENDUM

1. Rule 59(a), U.R.C.P.

2. Memorandum Decision, February 10, 1992

3. Findings of Fact, Conclusions of Law and Order Denying Defendant's Motion for New Trial or in the Alternative Remittitur, March 25, 1992

RULE 59(A), U.R.C.P.

Rule 59. New trials; amendments of judgment.

(a) **Grounds.** Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

MEMORANDUM DECISION, FEBRUARY 10, 1992

FEB 10 1992

C. Beverley

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

S. LARRY CROOKSTON, et al.,	:	MEMORANDUM DECISION
Plaintiffs,	:	CASE NO. CR-83-1030
vs.	:	
FIRE INSURANCE EXCHANGE,	:	
Defendant.	:	

Defendant Fire Insurance Exchange (hereinafter "Fire Insurance") has filed a Motion for New Trial or Remittitur, with supporting Memoranda; plaintiffs have responded by filing a Memorandum in opposition. These pleadings were filed after failed efforts to settle the controversy conducted by this Court on October 7, 1991.

This matter was tried with a jury for six days, commencing on the 26th day of May, 1987. After denial of defendant Fire Insurance's initial Motion for New Trial or Remittitur, the Utah Supreme Court in the matter of Crookston v. Fire Insurance Exchange, 164 Utah Adv. Rep. 3 (June 28, 1991), affirmed the jury verdict, but remanded the matter for further determination by this Court as to whether or not the punitive damage award

was appropriate and/or excessive. After submission of respective Memoranda, counsel presented oral argument in support of their respective positions on January 31, 1992. This Court having now reviewed the Memoranda, the Supreme Court decision, the file materials, the transcript, its own notes of the trial, and heard oral argument, is prepared to rule.

OPINION

At trial, plaintiffs' expert economist, Dr. Paul Randall, testified incident to the claim of economic damages sustained by the plaintiffs as a result of conduct alleged to have been inappropriate by the defendant Fire Insurance. He testified that those economic losses amounted to $323,399.00. The jury awarded the sum of $815,826.00 total compensatory damages. The Supreme Court has opined that the difference between the economic losses and the total amount of compensatory damages awarded, namely, $492,427.00 was "apparently attributable to emotional distress and loss of financial reputation." In addition, the jury awarded punitive damages in the amount of $4,000,000.00. This Court, subsequent to trial awarded $175,000.00 attorney's fees to plaintiffs, as well as their costs incurred of $11,126.00. Fire Insurance seeks, pursuant

to Rule 59(a)(5), a remittitur of the punitive damages of $4,000,000.00, or alternatively a new trial.

A Motion for a New Trial as presented, on the issue of punitive damages requires of the trial court a two-prong inquiry: (1) whether punitives are appropriate at all; and (2) whether the amount of punitives is excessive, appearing to have been given under influence of passion or prejudice. The responsibility of the trial court is to review the amount of the award to insure that the jury has acted within proper bounds. This is so because the trial judge is present during all aspects of the trial and listens to and views all witnesses and is in an advantaged position to determine if the jury acted with passion or prejudice. To grant a new trial, the trial court must conclude that the jury erred, not merely because it disagrees with the jury's judgment. The trial court, if it is inclined to grant a new trial or remittitur, should indicate wherein there was plain disregard of the instructions of the Court or the evidence, or what constituted passion or prejudice.

If the trial court reasonably concludes the jury acted with passion or prejudice contrary to Rule 59(a)(5) it may grant a new trial.

The award of compensatory damages in the amount of $323,339.00 for economic loss, and $492,427.00 for emotional and mental distress, and loss of financial reputation, for a total of $815,826.00, was upheld by the Supreme Court, as was the award of attorney's fees of $175,000.00, and expenses of $11,126.00. These sums this Court is advised were paid after the decision by the Utah Supreme Court.

In this case, the jury clearly concluded as did this Court, that the requisite mental state required to support an award of punitive damages was present, which finding was affirmed by the Supreme Court.

Punitive damages are designed to punish past and deter future, egregious conduct. Here, the award of $4,000,000.00 according to the Supreme Court exceeds the bounds of the general pattern set by prior Supreme Court decisions. In deciding, therefore, whether the award is or is not excessive, notwithstanding the fact that it exceeds the pattern of awards previously upheld, seven factors are to be considered. These are the same seven factors considered by the jury (in Instruction No. 33) in arriving at its verdict. This Court will address each, in a somewhat different order, commencing with the facts and circumstances surrounding Fire Insurance's misconduct.

I. FACTS AND CIRCUMSTANCES SURROUNDING FIRE INSURANCE'S MISCONDUCT

The most flagrant conduct of Fire Insurance centered around intentional fraud of its agents. By April 15, 1982, Fire Insurance, for the loss plaintiffs' sustained in December of 1981, had obtained bids from two contractors: one for $50,951.00; the other for $49,600.00; and had extended authority to settle the claim for $49,443.00. In May, 1982, the adjuster obtained another bid for $74,000.00. Immediately thereafter, Fire Insurance replaced its initial adjuster, Denton Mosier, with one "more experienced," Alan Clapperton. Alan Clapperton, while in possession of the three bids ranging from $49,600.00 to $74,000.00, and armed with authority to settle for $49,443.00, nevertheless, sought and obtained a fictitious bid based only on a portion of the loss, for $27,830.60, which was just slightly more than one-half of the other bids received. The evidence was undisputed that the bid did not account for several items comprising the plaintiffs' loss, and was based upon an engineering report which was not intended to be the basis of a bid. Clapperton knew the bid was insufficient; he knew the Crookstons would object to the bid; and moreover, he knew that the bank (loss payee) with whom he had arranged to meet to negotiate settlement, would not settle for such amount if the other bids were disclosed.

In order to accomplish his scheme, Clapperton simply told Ralph Klemm, counsel for the plaintiffs, on the very day he was scheduled to meet with the bank, that he had no authority to settle; concealed the existence of the fictitious bid; and without disclosing his intent to Klemm, surreptitiously conducted his negotiations with the bank. While meeting with the bank, Clapperton did not disclose the fact that three other bids, all substantially higher, had been obtained, nor did he reveal that the fictitious bid of $27,830.60 was based on an engineer's appraisal limited to structural damage only. The bank officer agreed to settle for slightly more than $32,000.00, the amount of the "bid", plus an approximation of the interest that had accrued on the Crookston loan since the collapse. Knowing full well that the $27,830.60 bid was substantially lower than any other bid, Clapperton insisted that the bank accept a settlement check made out only to the bank, not jointly to the bank and the Crookstons, and that the bank execute a proof of loss form releasing Fire Insurance from any further liability on the claim. The settlement was effected that same day. The intentional fraud was completed when Clapperton advised Klemm, when he discovered what had transpired, that the Crookstons did not have to be included in

the settlement, that nothing more was owing, and that he was closing his file.

Clapperton admitted at trial that he knew that the bank would pursue the Crookstons for a deficiency claim on the $60,000.00 construction loan not paid by the insurance settlement. Clapperton purposely sought an incomplete and unrealistic bid from an insider, Phipps; concealed the bid from the Crookstons, lied to their attorney about the status of the claim on the very day he negotiated with the bank; did not disclose that he had any settlement authority; and deliberately excluded the Crookstons from negotiations with the bank. Because the Crookstons lacked the means to pay off the loan, the bank threatened foreclosure. In order to avoid additional interest, attorney's fees and costs, the Crookstons deeded the property on which the home stood, to the bank in lieu of foreclosure, and then filed bankruptcy.

Clapperton left the Crookstons vulnerable to foreclosure and bankruptcy knowing that would be the likely consequence of his actions.

Clapperton's supervisor, Kent Soderquist, had previous experience as a loan officer for a bank and was aware of the bank's foreclosure rights under its Deed of Trust. Both

Soderquist and Clapperton were well aware that if insurance proceeds were not timely and adequately paid, the bank would foreclose. Furthermore, Fire Insurance through its agents had actual knowledge that the bank was proceeding or intended to proceed to foreclose on Crookstons' property. The most graphic evidence of Fire Insurance's intent evidencing total indifference to the Crookstons' plight, can be seen from the language of the letter, a trial exhibit, from Clapperton to Frank Roybal, counsel for Fire Insurance, dated July 27, 1982, at page 3, wherein Clapperton states as follows:

> The bank has indicated that they intended to proceed with foreclosure on the lot in order to recoup the $18,000.00 they were still out on the construction loan.... At this point, we feel Farmers Insurance Group would have a subrogation right against several of the parties involved.

All of Fire Insurance's representatives acknowledged at trial that the purpose of insurance was to prevent extreme financial hardship and loss of property that would otherwise occur, but for insurance. Fire Insurance ratified and approved all of the actions taken by its agents. The regional office of Fire Insurance and the district branch claims manager reviewed the claims file routinely during all relevant times, and had made various communications to the adjusters.

After the Crookstons filed a complaint with the Utah State Insurance Department, the regional office denied any

responsibility to the Crookstons. Incredibly the agents of Fire Insurance testified at trial that the practices which had been employed in this case were sound business practices. Three of Fire Insurance's employees who testified at trial stated that they believed they had treated the Crookstons fairly. The claims adjuster who committed the fraud, Clapperton, stated without any indication of remorse or regret, that he "felt good" about what he did to the Crookstons. Apparently, based upon his record of improving profits for Fire Insurance, he was twice promoted since his dealings with the Crookstons. He is now the District Claims Manager supervising the adjustment of all claims in northern Utah.

II. THE RELATIVE WEALTH OF THE DEFENDANT

At trial, evidence established that Fire insurance's total assets in 1986, the year immediately prior to the date of the trial, were $723,468,116.00; its total underwriting, investment and other income for 1986 was $595,284,582.00; and its net income for that one year was $23,000,000.00. At the time of the trial, the evidence disclosed that there were four claims offices in Utah, each handling 4,000 to 5,000 claims per year. In addition, scores of other offices located in the western

United States handle a similar number of claims. Fire Insurance is only one of approximately five insurance companies doing business as Farmers Insurance Group. Four of the five Farmers companies use the same claims offices, management, and presumably the same claims adjustment techniques as that of Fire insurance. When compared to the total assets of Fire Insurance only, for 1986, the punitive damage award amounts to approximately one-half of one percent. It goes without saying that there is no rational comparison between Fire Insurance's assets and income to that of plaintiffs: they were bankrupt.

III. NATURE OF THE ALLEGED MISCONDUCT

Milton Beck, an insurance adjuster with 22 years of experience, and Dr. Paul Randall, a professor of finance, who teaches property and casualty insurance at Utah State University, persuasively described the actions of Fire Insurance as "blatantly outrageous" and "totally unacceptable", outlining the following wrongful actions:

(a) Excluding the Crookstons from settlement negotiations;

(b) Relying on a bid which was almost one-half of other bids. Such a discrepancy would mean there was something wrong with the low bid;

(c) Failing to disclose all other bids to the bank;

(d) Improperly requiring the bank to sign a satisfaction of claim and release without rebuilding the home;

(e) Requiring the bank to sign a release and refusing to deal with the Crookstons thereafter, leaving the Crookstons personally exposed to further proceedings by the bank;

(f) Representing that the Phipps bid ($27,830.60) was adequate, and all that was owing under the policy, when there were clearly other coverages and amounts owing thereunder;

(g) Refusing to include the insureds' name on a settlement check in payment of a substantial amount of money;

(h) Representing that engineer Rich's report (on which the Phipps "bid" was obtained) was a complete analysis of the damage when it was not;

(i) Using the Crookstons' failure to sign a proof of loss form as grounds for denying their claims, particularly when the Crookstons were not provided with such a form, and adequate evidence of the loss had been provided to Fire Insurance;

(j) Rejecting the bids of Brewster, Stallings and Jones (the three legitimate bids) because of insufficient detail, without requesting the additional information and detail;

(k) Failing to disclose to the Crookstons that Fire Insurance was rejecting the other bids and the reasons therefore;

(l) Not communicating with the Crookstons during the entire adjusting process;

(m) Refusing to consider additional claims of the Crookstons after settling with the bank, denying responsibility to the insurance commissioner when a complaint was filed by the Crookstons, and forcing the Crookstons to bring legal action;

(n) Refusing to clean up the collapse, even after the city had given notice and threatened to condemn the property due to the hazardous situation;

(o) Delaying over six months while the Crookston home was unfit for occupation, before making any attempts to settle;

(p) Maintaining a company policy that the only duty of an adjuster is to protect the financial interests of the insurance company and not the insured.

The evidence supporting Fire Insurance's position with regard to the adjustment of the Crookstons' claim and Fire Insurance's apparent satisfaction with the manner in which its

own insureds were treated represents both to this Court and apparently to the jury, that ill-will, malice and/or total indifference to the Crookstons was its attitude. Having sought an inadequate bid, and having excluded the Crookstons from the negotiations, Fire Insurance was in total control of the settlement with the bank. Knowing that the settlement would have a devastating impact on the Crookstons, Clapperton nevertheless proceeded in a fraudulent, malicious fashion with one goal in mind: to cheat the plaintiffs out of their just due and thereby presumably improve his standing with his employer. By their actions, the agents and representatives of Fire Insurance demonstrated either actual malice and ill-will toward the Crookstons and intended the consequence of their actions, or Fire Insurance's agents acted wrongfully, solely to further their own financial well-being, despite actual knowledge of devastating harm to the Crookstons.

IV. THE EFFECT OF DEFENDANT'S MISCONDUCT ON THE LIVES OF THE PLAINTIFFS AND OTHERS

The plaintiffs each testified at trial to the devastating effect the actions of Fire Insurance had on their personal

lives. They suffered serious emotional and nervous conditions, which were of long-standing nature, and the devastation testified to continued from the date of the loss, at least through the trial (approximately six years). In addition, the plaintiffs were forced to file bankruptcy and lost, as a result, all of their savings and the lot they had purchased upon which to build their "dream home."

The loss to others involved the parents of the plaintiffs who had loaned them some $12,000.00 for the construction of their home. They were not paid until after the Supreme Court decision in this matter, in June 1991, some ten years after the loss. In addition, none of the Crookston bankruptcy creditors were paid. The bank, after settling with Fire Insurance and being required to foreclose and repossess the Crookstons' property, nevertheless sustained a loss of approximately $5,000.00. Subcontractors who provided materials and labor to the Crookstons' home were forced to file liens and commence a suit against the Crookstons. The general contractor was never fully paid, and Fire Insurance failed to timely clean up the debris from the collapse of the home, forcing the city where the home was located to seek condemnation of the Crookstons' property because of the hazardous condition it created for neighborhood children.

V. THE PROBABILITY OF FUTURE RECURRENCE OF THE MISCONDUCT

Fire Insurance has maintained a stance of denial of wrongdoing since the beginning of this case. All of the witnesses for Fire Insurance testified they believed they had treated the Crookstons fairly. Clapperton, moreover, testified that he felt good about what he did to the Crookstons. Clapperton has been twice promoted since the incident in question, and as indicated he is now District Claims Manager for Northern Utah.

Denton Mosier, since his involvement in the matter, has been made supervisor and testified that the handling of the Crookstons' claim was done according to company policy, was appropriate, and was handled in a fashion similar to the handling of other claims.

Mr. Soderquist, Clapperton's supervisor at the time of the loss, described the claims adjusting philosophy of not just Fire Insurance, but for all Farmers Insurance Group to indicate that the adjuster's sole responsibility is his duty to the insurance company: to protect the insurance company's interests. And any efforts to assist the insureds in proving their loss would be "beyond the scope of his actual duties as an adjuster." He testified the adjuster does not have a duty

to protect the interests of the insureds, and technically the adjuster is not required to be concerned about public relations.

In addition, the evidence revealed that there are approximately four claims offices of Fire Insurance in Utah, each handling 4,000 to 5,000 claims per year, and scores of other such claims offices throughout the states which handle a similar number of claims. These claims offices adjust most, if not all, claims of all members of the Farmers Insurance Group.

It is the view of this Court, that Fire Insurance's conduct and lack of remorse incident thereto demonstrate a calculated and calloused attitude toward the settlement of claims, and this is in accord with what agents of Fire Insurance perceive to be in keeping with their company policy.

From Fire Insurance's point of view, it certainly can be argued that $4,000,000.00 punitive damages is excessive. However, from a public policy point of view, the award is justified. In the absence of punitive damages, Fire Insurance may well find that it is profitable to continue its illegal conduct, even though it may incur the cost of compensatory damages from time to time. One may never know how many of the thousands of claims handled in Utah and elsewhere by Fire

Insurance have been subjected to the same kind of fraudulent manipulation as occurred in this case, with devastating losses to those who contracted in good faith. A $4,000,000.00 punitive damage award can certainly have a salubrious effect in inducing Fire Insurance to bring its practices into harmony with common moral conduct and accepted business ethics, to say nothing of the requirements of the law.

VI. RELATIONSHIP OF THE PARTIES

The loss payee provision in favor of the bank on the insurance policy with Fire Insurance created a relationship between the Crookstons and Fire Insurance of one in the nature of a fiduciary relationship. In a third party insurance situation, the insurer is a fiduciary of the insured. The insurer assumes responsibility for the insured and control over the claims of third parties against the insured. By contrast, in first party situations, the insurer and the insured are essentially adversaries, because their interests concerning payment under the policy are opposed.

The instant matter is somewhere between a first and third party situation. The insurer by its loss payee responsibility assumed the position of standing in for and protecting the

interests of the Crookstons from claims of the bank, the loss payee. If Fire Insurance did not have a legal duty to protect the interests of the Crookstons, it at least had the responsibility to avoid doing harm to the Crookstons by surreptitiously settling with the bank for sums admittedly much less than the balance owing on the bank obligation; the policy limits; and well below the amount of the legitimate bids known to the defendant.

VII. THE AMOUNT OF ACTUAL DAMAGES AWARDED

The actual attorney's fees paid by the Crookstons were based upon a contingency fee of 40%. This Court, however, only awarded $175,000.00 in fees, which was a little more than half of the actual fees paid by the Crookstons. The fees and litigation expenses constituted an actual loss to the Crookstons. In determining the ratio, the Supreme Court used the words "actual damages." Since the attorney's fees and litigation expenses were an "actual" damage sustained by the Crookstons and were awarded by the Court, such figures should be included in determining the ratio. This is consistent with Canyon Country Store v. Bracey, 781 P.2d 414 (Utah 1989), wherein the Supreme Court held that the actual contingent fee

was a consequential damage and should be awarded against the insurer who acted in bad faith, stating at 420:

> Canyon Country's claim for recovery of fees was predicated on the theory that attorney fees were an item of consequential damages flowing from the insurers' breach of contract. This is a legitimate theory of damages, as the trial court recognized.

Had Canyon Country been decided before the Crookston trial, this Court would have awarded a 40% contingent fee instead of $175,000.00 in "reasonable" fees actually awarded. The deficit of $151,330.00 as unawarded fees, constitutes additional "actual" loss to the Crookstons.

The amount of actual damages incurred amounts to $1,153,282.00 ($815,826.00 compensatory, $175,000.00 and $151,330.00 attorney's fees, and $11,126.00 expenses and costs). When compared to the punitive damage sum awarded of $4,000,000.00, the ratio is approximately 2.88 to 1. There is nothing in the Crookston opinion that would suggest that the presumptive ratio is based on "hard" damages, rather than all "actual" damages. In fact, in the cases cited in Crookston where "soft" damages were awarded, the ratio cited by the court includes the "soft" damages. The Supreme Court suggests that if a substantial portion of the damages are "soft", the trial

court may consider that fact on a motion for remittitur. However, it is not a factor to determine the ratio. The Utah Supreme Court has never suggested that "soft" damages are not real or should not be compensated.

Though the amount of so-called "soft" damages comprises approximately 60% of the total compensatory damage award, those damages were nevertheless real, and represented suffering and loss sustained by plaintiffs. The plaintiffs' emotional distress was severe and of longstanding duration. The jury was instructed as to what properly constitutes emotional distress, pain and suffering. The Supreme Court has affirmed that determination by the jury as being well within their discretion. This Court's view is that the jury's finding was appropriate and supported by the evidence.

As the Utah Supreme Court stated in the case of Price v. Peterson, 538 P.2d 1325 (1975), at 1329:

> The pain and suffering inflicted on the mind and the emotions by such wrongful act of another is no less real; and should be no less entitled to be compensated for.

The problem is not that emotional harm should not be compensated, but how to insure that the damages awarded are commensurate with the emotional harm. In addressing the

problem, courts often consider whether there is physical harm associated with the mental harm. Courts also examine the conduct of the defendant to determine whether emotional harm will naturally and reasonably follow therefrom. Professor Prosser, in discussing this issue, stated:

> [W]here physical harm is lacking, the courts will properly tend to look for more in the way of extreme outrage as an assurance that the mental disturbance claimed is not fictitious; but that if the enormity of the outrage itself carries conviction that there has in fact been severe and serious emotional distress which is neither feigned, nor trivial, bodily harm is not required.
>
> Prosser, "Insult and Outrage," 44 Cal.Rev. 40 (1956).

The actions of Fire Insurance were extreme and outrageous. There is nothing fictitious or trivial about the Crookstons' bankruptcy and loss of their home and property. Given the egregious conduct and succeeding events, there is no doubt that the Crookstons' claims for mental distress are real, unfeigned, and far from trivial and therefore should be viewed as real damage.

The amount of punitive damages awarded must bear some reasonable relationship to the actual compensatory damages incurred as the jury was instructed in Instruction No. 34.

Despite the fact that the ratio here involved is higher than has been generally approved by the Supreme Court in the past, here the defendant is a multi-million dollar corporation. Moreover, it is this Court's view that Fire Insurance has displayed an extremely high degree of malice, with actual intent to harm for the benefit of its own financial interests, or at the very least, a high degree of likelihood of great harm to the plaintiffs based upon the reprehensible nature of the acts involved.

The calculation of the ratio is simply one of seven separate elements and to be given, in this Court's view, no greater or lesser weight than any of the other six elements. One must not simply, mechanically apply an arbitrary ratio, thereby allowing the ratio factor to subsume all of the other six factors to be considered. It is necessary and appropriate to send a clear and unmistakable message to Fire Insurance and others similarly situated that the type of egregious conduct involved which results in the devastating loss, both financial and emotional as here involved, will not be tolerated. This, the jury has done. There was no evidence at all at trial that the practices and procedures involved have in any manner been changed by Fire Insurance. There was no indication of

contrition or remorse and, in fact, it appeared that Fire Insurance was pleased with the outcome of the adjustment of the loss, and to this day has failed or refused to recognize the wrong that it has wrought upon the plaintiffs. If the facts of this case do not warrant deviation from the historically approved ratio of punitives to compensatory damages, it is difficult if not impossible for this Court to conceive of a fact situation wherein a deviation is warranted.

For the foregoing reasons, as well as those delineated in the Memorandum of the plaintiffs in opposition to defendant's Motion for New Trial or Remittitur, this Court is not persuaded the jury acted under the influence of passion or prejudice, and the Motion of Fire Insurance is denied. Counsel for plaintiffs is directed to prepare the appropriate Order.

Dated this 10th day of February, 1992.

J. DENNIS FREDERICK
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 10th day of February, 1992:

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C. Beverley

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL OR IN THE ALTERNATIVE REMITTITUR, MARCH 25, 1991

MAR 2 5 1992

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IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

S. LARRY CROOKSTON, RANDI L. CROOKSTON, and ANNA W. DRAKE, Trustee of the Estate of SPENCER LARRY CROOKSTON and RANDI LYNN CROOKSTON, Plaintiffs, v. FIRE INSURANCE EXCHANGE, a California corporation, Defendant.	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL OR IN THE ALTERNATIVE REMITTITUR Civil No. C83-1030 Judge J. Dennis Frederick

Defendant Fire Insurance Exchange's Motion for New Trial or in the Alternative Remittitur came regularly before the court on the 31st day of January, 1992, at the hour of 8:30 a.m. The parties previously filed memoranda in support and in opposition to the motion. This court reviewed the memoranda, the Supreme Court opinion, the file materials, the transcript, its own notes of the trial and considered extensive oral argument by counsel. The court thereafter took the matter under advisement and issued a Memorandum Decision on February 10, 1992, wherein the court articulated its findings of fact and conclusions of law supporting its

decision to deny defendant's motion. Said Memorandum Decision is fully incorporated herein by reference.

This court reaffirms its denial of defendant's Motion for New Trial and Remittitur and reaffirms its conclusion that the punitive damage award should not be reduced. In so doing, the court expresses the following conclusions in conjunction with its more detailed analysis of its findings and conclusions contained in its Memorandum Decision.

1. The primary purposes of punitive damages are to punish and deter serious wrongdoing which is destructive to the social fiber of our society. The severity of the punishment should coincide with the severity of the wrongdoing. Likewise, the greater the potential is that the wrongdoing is widespread and profitable, the greater the need is for deterrence.

2. Regarding the purpose of punishment, the court has carefully analyzed the nature and extent of defendant's wrongdoing and the effect thereof. It is this court's view that Fire Insurance has displayed an extremely high degree of malice, with actual intent to harm for the benefit of its own financial interests, or at the very least, a high degree of likelihood of great harm to the plaintiffs. Defendant's actions were reprehensible and involved intentional fraud for financial gain. Defendant's wrongdoing had devastating effects upon the Crookstons and to a lesser degree, many other innocent parties. Defendant's wrongdoing was particularly aggravating and reprehensible due to the nature of its business, i.e. marketing, advertising and selling "peace of mind" and "hope" to those who had been devastated by catastrophic events. When an insurer is called upon to perform, its insureds are often victims of tragic events, leaving them financially and emotionally vulnerable. The potential adverse effect on the lives

of family members, neighbors, employers and others is also great. Under these circumstances, intentional fraud for profit is even more culpable. The severity of defendant's actions in this case requires a severe punishment and the punitive damage award of $4,000,000 is not overly severe.

3. The second purpose of punitive damages, deterrence, is equally applicable in this case. Defendant's conduct and lack of remorse incident thereto, not just at the time of the wrongful conduct but even thereafter throughout the litigation, demonstrate a calculated and calloused attitude toward the settlement of claims, and this was in accord with what agents of defendant perceived to be in keeping with their company policy. The wrongdoing in this case was motivated by financial gain. When dealing with a multi-million dollar corporation which appears to have a prevailing philosophy that justifies unscrupulous behavior for financial gain, a significant punitive damage award is required to obtain the desired result of bringing defendant's practices into harmony with common moral conduct, accepted business ethics and the requirements of the law.

4. This court concludes that the most effective means of punishing and deterring the defendant in this case is through a significant punitive damage award. Insurance companies are generally regulated by the Insurance Department of the State of Utah. This case illustrates the lack of deterrent effect of the Insurance Department. After Crookstons filed a complaint with the Insurance Department, defendant's regional office denied any responsibility to the Crookstons. The Insurance Department then advised the Crookstons that it could do nothing further and that Crookstons would need to seek a judicial remedy. As in this case, there is

nearly always a large disparity between the financial resources of an insurer and its insured, particularly after a catastrophic loss. The deterrent value of punitive damages is one of the very few equalizing tools an injured party has against a multimillion dollar corporation which engages in such wrongful practices.

5. The ratio of compensatory damages to punitive damages in this case exceeds the presumptive ratio set by the Utah Supreme Court in the Crookston opinion. (On page 19 of the Memorandum Decision this court erred in computing the ratio in this case. The ratio should be 3.47 to 1 instead of 2.88 to 1 and the Memorandum Decision is therefore amended accordingly.) For the reasons set forth above, a ratio greater than the presumptive ratio is justified. Defendant, by the very nature of its business, has the capacity and expertise to calculate in advance its exposure to liability and spread the cost thereof, thus diminishing the deterrent effect of punitive damages if limited by a ratio or ceiling. In this case the relative importance of the presumptive ratio should therefore be less.

6. The collective analysis of the seven factors upon which a punitive damage award is based weighs heavily in favor of sustaining the $4,000,000 award. In fact, with the exception of the presumptive ratio, all of the seven factors support the award. If the facts of this case do not warrant deviation from the historically approved ratio of punitive to compensatory damages, it is difficult if not impossible for this court to conceive of a fact situation wherein a deviation is warranted.

It is therefore ORDERED, ADJUDGED and DECREED that defendant Fire Insurance Exchange's Motion for New Trial or in the Alternative Remittitur is denied.

DATED this 25th day of March, 1992.

BY THE COURT:

J. Dennis Frederick
District Court Judge

Approved as to Form:

STRONG & HANNI

By: _____
Philip R. Fishler
Stephen J. Trayner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL OR IN THE ALTERNATIVE REMITTITUR was hand delivered this 10th day of March, 1992 to:

Philip R. Fishler
Stephen J. Trayner
Strong & Hanni
ATTORNEYS FOR DEFENDANT FIRE
INSURANCE EXCHANGE
Sixth Floor Boston Building
Salt Lake City, UT 84111

and mailed first class mail this 9th day of March, 1992 to:

Frank A. Roybal
ATTORNEY FOR DEFENDANT FIRE
INSURANCE EXCHANGE
442 No. Main Street
Bountiful, UT 84010

Julie K. Curtis

CERTIFICATE OF HAND DELIVERY

I hereby certify that four true and correct copies of the foregoing Brief of Defendant-Appellant was hand delivered this 22 day of July, 1992, to the following:

L. Rich Humpherys
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